In the Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-6621

WILLIAM JOSEPH McMURTREY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, WILLIAM JOSEPH McMURTREY, prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this matter on September 7, 1976. Petition for Rehearing and Rehearing En Banc was denied on October 12, 1976.

accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

STATEMENT OF THE CASE

On May 13, 1974, Raymond Magno, Special Agent in Charge of the Drug Enforcement Administration's West Palm Beach, Florida, office was told by a private citizen that one Charles Dale had purchased a home in Lake Park, Florida, for $125,000.00 with a down payment of $25,000.00,[1] and that Dale had expressed a desire for a house on the water with a dock. Later, Magno was told that there was "suspicious activity" at the house in the form of people going in and out.

The next piece of "intelligence" he received was that a boat had arrived and docked at the home on May 23, 1974, and remained for only a day before departing. He was also told that there had been some young, adult males at the house who left when the vessel departed, and that, on June 1, 1974, a mobile home was seen parked in front of the house (a conveyance which, in Magno's experience, was used to transport marijuana). When the vessel had been gone for about a week, Magno decided to place the house under surveillance. He admitted that neither of two (2) memoranda which he had prepared concerning this action referred to any belief on his part that there was going to be contraband on board the boat when it returned,

[1]There was no indication from the testimony adduced at the evidentiary hearing on Petitioner's Motion to Suppress that the deposit was in currency or some unusual form. A check by Magno on Dale's background had not revealed that he had any criminal record whatsoever.

and conceded several times that he certainly had no basis upon which to apply for a search warrant for the premises or arrest warrants for any of the persons observed at the house or on the boat.

On June 7, 1974, a vessel generally fitting the description of the boat which had earlier been seen at the house was observed proceeding north in the Intracoastal Waterway (ICW). No one reported ever seeing the vessel out in the ocean, or entering one of the "cuts" which lead from the ocean to the ICW—just that it was proceeding in a northerly direction in the ICW.[2] The boat ultimately arrived at the dock behind the Dale residence. No one reported seeing any contraband on board it.

Magno called a conference with some of his men to decide what to do. While conferring a short distance from the house, Magno observed a green Cadillac, which he had seen at the house before, drive by the "conference" site. He was afraid that he and his men might have been seen gathered and decided, simply, to surround the house on all sides so no one could leave and then send "Customs" in to interrogate the occupants in order to determine from where the boat had come.

Accordingly, several different carloads of law enforcement personnel, comprised of D.E.A. agents, Customs officers and Sheriffs Deputies "moved in" rather fast onto the property of Dale's house, completely surrounding it, so no one could leave. Indeed, a surprised occupant, who opened the front door to see what was going on, was told to "Hold it." This person quickly shut the door. Magno testified that

[2]The Customs Patrol officer who spotted the boat testified that he did not know *where* the boat came from.

"Hold it" was hollered "to hold [whomever it was] *so Customs could find out* who had brought the boat in and whether or not it had gone foreign." His men, he said, were instructed to hold everyone "[t]o let Customs conduct their *interrogation*. . . ."

Consistent therewith, a Customs Patrol officer, having entered onto the property with the other agents, questioned Dale over on the side porch of his home where he had already been detained by a D.E.A. agent. When asked by this officer where the captain of the vessel was, he pointed mutely to the inside of the house. The officer, without seeking either consent or permission, walked from the porch through an already open sliding glass door into the house where he now confronted Richard Hailstone. He flashed his identification and asked him whether he was the boat's captain and whether he had "come foreign." Hailstone replied affirmatively to both questions. The officer then advised him that he had not cleared Customs and he and his boat were under arrest.

As Hailstone was led out to his boat, Magno and the other agents "held" Petitioner and everyone else inside the house while Customs checked the boat.[1] In a few moments, Customs reported that marijuana had been found on the vessel. Petitioner and the others were then told they were under arrest.

The Government attempted to defend against Petitioner's claim that law enforcement had illegally entered

[1]Petitioner actually was found hiding in a room in the garage several hours after Hailstone was questioned. As the Fifth Circuit did not advert to this fact in its opinion, Petitioner does not believe it is significant in light of the legal issues presented.

upon the Dale property and had illegally entered into the Dale house, as a result of which information was obtained which led to the seizure of the marijuana without either warrant or "probable cause," by asserting as justification the concept of "border crossing." The trial court agreed with the Government's argument and denied Petitioner's motion to suppress.

On appeal, the Fifth Circuit ruled that, assuming *arguendo* the illegality of the agents' conduct, Petitioner had no standing to contest the Government's seizure of the verbal information from Hailstone which led to the search of the vessel.

REASONS RELIED UPON FOR GRANTING THE WRIT

I

THE COURT OF APPEALS FOR THE FIFTH CIRCUIT HAS RENDERED A DECISION IN THE INSTANT CASE WHICH IS IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEAL ON THE SAME SUBJECT MATTER.

In *United States v. Guana-Sanchez*, 484 F.2d 590 (7th Cir., 1973) the defendant was convicted of unlawful transportation of aliens within the United States. Illinois police officers had seen Sanchez sitting in a station wagon with its headlights and interior lights on some distance away from their own patrol car. When the officers approached, they saw that he was reading an Illinois road map and

observed three other males in the car. Further inquiry disclosed that Sanchez had a valid driver's license but that his passengers were probably Mexican.

Two passengers were ordered into the patrol car and Sanchez and his third passenger were "invited" to the police station. Thereafter, the police learned from the passengers that they had entered the United States illegally.

The District Court ruled that Sanchez was, in effect, taken into custody for "investigation," and that the police officers had made an illegal arrest. In affirming, the Seventh Circuit ruled:

> "The government concedes that the *testimony* of witnesses *discovered during an illegal search can be suppressed as to a person having standing to object.* We think the same is true in the event of an illegal arrest. * * *" Id., 484 F.2d at 592, fn. 4.

In *United States v. Mallides*, 473 F.2d 859 (9th Cir. 1973) two city police officers stopped a car travelling in the opposite direction from themselves because the occupants appeared to be six Mexican-appearing males seated very erect in their car and who did not look at the marked patrol car as it passed. Mallides was ultimately tried and convicted for aiding and abetting the illegal entry into the United States of aliens. His alien passengers testified against him. Mallides argued, and the Ninth Circuit agreed, that their testimony was the product of an illegal detention. *Id.*, 473 F.2d., at 862.

In the instant case, the Fifth Circuit assumed without deciding that the entry of the Government agents into

Dale's house and the securing of everyone on the premises for interrogation so as to learn whether the vessel had "come foreign" was illegal. The information acquired from Captain Hailstone led directly to the search and seizure of the vessel and its illicit cargo. The search and seizure, then, having been bottomed on the fruit of an illegal entry onto the premises, was similarly poisoned. Hailstone and Petitioner shared occupancy of the residential premises illegally entered; and, by his presence, Petitioner shared the illegal interrogation which followed.

If Sanchez and Mallides had standing to object to the admissibility of verbal information acquired from third persons discovered during their collective illegal arrests, then Petitioner must be accorded the same status; otherwise, the law respecting standing is thoroughly in disarray amongst the Circuit Courts of Appeal.

II

THE COURT OF APPEALS FOR THE FIFTH CIRCUIT HAS DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

Since *Jones v. United States*, 362 U.S. 257, 261, 80 S.Ct. 725, 731 (1960), thence *Alderman v. United States*, 394 U.S. 165, 89 S.Ct. 961 (1969) and, recently, *Brown v. United States*, 411 U.S. 223, 93 S.Ct. 1565 (1973), this Court bestowed "standing" on *any* person whose reasonable expectation of privacy has been invaded illegally by the Government. If, as a result of such an intrusion, information was acquired by the Government, this Court has denied the Government the use of such information in trial

so as to deter future misconduct of a similar nature. See *Brown v. United States*, supra, 411 U.S., at 229, 93 S.Ct., at 1569.

Petitioner asserts solely *his* reasonable expectation of privacy in another's home. "Privacy," though never defined *per se*, denotes an atmosphere or surrounding in which one or more persons, so gathered, establish their existence apart from the public-at-large; it is that state which one or more persons creates, generally physically, so that they reasonably may expect that others, not invited, cannot know what their affairs are. As to persons gathered in private where they, and each of them, has a legal right to be, the Government is absolutely forbidden from intruding without legal warrant. If, nevertheless, the Government does enter without warrant, and not in pursuance of some exception to the warrant requirement, then anything seized by the Government or learned by its agents *at the time of its illegal entry* is tainted by the Government's conduct.

It has not mattered whether the Government seizes tangible or intangible evidence. *Wong Sun v. United States*, 371 U.S. 471, 485-486, 83 S.Ct. 407, 416 (1963).[4] Even the spoken word is suppressible if the Government acquired it, and the substance and content of it, illegally. *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507 (1967). Hence, the information and words acquired illegally from Hailstone as a direct result of the Government's illegal entry upon private premises, where Petitioner and others were privately gathered, cannot be reasonably distinguished from these fundamental concepts and the cases embodying them.

[4] "* * * Thus, verbal evidence which derives so immediately from an unlawful entry and an unauthorized arrest . . . is no less the 'fruit' of official illegality than the more common tangible fruits of the unwarranted intrusion. * * *" *Wong Sun v. United States*, supra.

The point is that the Government illegally entered private premises to look for and find evidence by which to determine whether the subject vessel had "come foreign" and then immediately used the evidence it developed as a result of its illegal entry to uncover additional incriminatory evidence. The form of the evidence illegally seized has never controlled the standing issue. *Standing is conferred by being a part of the atmosphere of privacy which has been invaded.*

The instant case is one where the Government illegally entered the private confines of a private residence and illegally overheard (albeit by interrogation) the words of an occupant *when it had no legal right to be there*. See *Alderman v. United States*, supra, 394 U.S., at 176, 89 S.Ct., at 968.

When the agents made the fateful decision to surround the house and to restrain the liberty of all within and, without either warrant or probable cause, to enter to search wherever they had to, *or whomever they had to*, in order to uncover evidence of where the vessel had come from, the agents' actions were directed illegally against the privacy of the premises, and the privacy of every defendant lawfully present thereon. The present decision conflicts with vibrant and inveterate Supreme Court decisions respecting both standing and the *lack* of meaningful difference between forms of evidence illegally seized.

III

THE COURT OF APPEALS FOR THE FIFTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

In *United States v. Brignoni-Ponce*, __ U.S. __, 95 S.Ct. 2574 (1975) this Court recognized the sensitivity of the issue of whether the "exclusionary rule" reaches far enough to exclude the at-trial testimony of witnesses discovered, along with the defendant, during an illegal arrest, detention or search:

> "There may be room to question whether voluntary testimony of a witness at trial, as opposed to a government agent's testimony about objects seized or statements overheard, is subject to suppression as the fruit of an illegal search or seizure. See *United States v. Guana-Sanchez*, 484 F.2d. 590 (C.A. 7, 1973), writ dismissed as improvidently granted, 420 U.S. 513, 95 S.Ct. 1344, 43 L.Ed. 2d 361 (1975). But since the question was not raised in the petition for writ of certiorari, we do not address it." *Id.*, __ U.S. at __, 95 S.Ct., at 2577-2578, fn. 2.

While the issue in the case at bar does not arise in the context of third party testimony at trial, it does raise the question of whether the defendant would have standing in the first place to object to the admissibility of such testimony, no matter what the reach of the "exclusionary rule" might be. Frankly, it seems rather obvious that such a defendant would have standing.

The instant case is no different, except that Hailstone's information was not used at trial. This is, indeed, an unsettled question of federal law as the Court noted in *Brignoni-Ponce*, supra. Its importance, however, in the present factual context lies in the fact that Petitioner is presenting to this Court for consideration the threshold issue of "standing" which must be resolved *before* deciding the reach of the "exclusionary rule."

CONCLUSION

For the above and foregoing reasons a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies hereof were mailed to the Solicitor General, Department of Justice, Washington, D.C., 20530, this _____ day of November 1976.

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.

No. 75-3486.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MICHAEL RAY ALLEN and
WILLIAM JOSEPH McMURTREY,
Defendants-Appellants.

Sept. 7, 1976.

By judgment of the United States District Court for the Southern District of Florida, at West Palm Beach, Norman C. Roettger, Jr., J., the defendants were convicted of knowing importation of marijuana and knowing and intentional possession of marijuana with intent to distribute and they appealed. The Court of Appeals, Roney, Circuit Judge, held that even assuming that questions asked by government agent of house owner and vessel captain, which furnished a basis for agents' legal boarding of boat on which marijuana was found, did violate the constitutional rights of house owner and vessel captain, this furnished no basis for suppression of evidence with respect to defendants against whom case could be successfully proved without introducing in evidence the customs agents' con-

frontation with vessel captain, and that one defendant was not denied effective assistance of counsel when trial court denied counsel's motion to withdraw.

Affirmed.

1. Searches and Seizures —7(26)

Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence. U.S.C.A.Const. Amend. 4.

2. Criminal Law —394.5(2)

Defendants, who were charged with knowing importation of marijuana and with knowing and intentional possession of marijuana with intent to distribute and who were arrested at home after marijuana was discovered on a boat behind house, could not suppress as evidence marijuana seized aboard boat even assuming that questioning of boat captain and house owner, whose answers furnished legal basis for boarding boat, was done in violation of their respective constitutional rights, since case against defendants could be proved without reference to those questions and answers. U.S.C.A.Const. Amend. 4; 18 U.S.C.A. § 2; Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 1002(a), 1010(a)(1), 21 U.S. C.A. §§ 841(a)(1), 952(a), 960(a)(1).

3. Criminal Law —641.13(2)

Review of record in prosecution for knowing importation of marijuana and knowing and intentional possession

of marijuana with intent to distribute failed to disclose that defendant was denied effective assistance of counsel when counsel's motion, made six months after undertaking case and within two months of trial, to withdraw was denied.

Appeals from the United States District Court for the Southern District of Florida.

Before DYER, SIMPSON and RONEY, Circuit Judges.

RONEY, Circuit Judge:

Michael Ray Allen and William Joseph McMurtrey appeal their convictions for knowing importation of 5,814 pounds of marijuana in violation of 21 U.S.C.A. §§ 952(a), 960(a)(1) and 18 U.S.C.A. §2, and knowingly and intentionally possessing with intent to distribute marijuana in violation of 21 U.S.C.A. § 841(a)(1) and 18 U.S.C.A. § 2. Appellants were arrested with several other persons at a Florida waterfront home after the marijuana was discovered on a 43-foot boat behind the house.

Suppression of the marijuana's use as evidence being denied, the two appellants waived their right to a jury trial. The disposition of the charges against the various other defendants is not of concern in this appeal. Both appellants appeal the correctness of the denial of the motions to suppress, and Allen contends that the court erred in denying his defense counsel leave to withdraw. Finding no illegality in the discovery by the government agents of the marijuana, and denial to counsel of leave to withdraw to be within the trial court's discretion, we affirm.

As in most search cases the facts are essentially undisputed but important. This investigation began as a result of information received from a private citizen on May 13, 1974, by Raymond G. Magno, Special Agent in Charge of the Drug Enforcement Administration (DEA) in West Palm Beach, Florida. Agent Magno was informed that Mr. Charles Dale had purchased a $125,000 house with a $25,000 down payment and that his primary interest in purchasing this home was its facility for docking a 40-foot boat on the Intracoastal Waterway. Subsequently Agent Magno was provided with additional information that a 43-foot boat had been at the residence for one day on May 23 and had then departed. There had been several young, adult males in and out of the house who departed when the vessel left.

On May 25, 1974, Agent Magno drove past the house and observed a green Cadillac in the driveway with Missouri license plates on it. He felt the house had been abandoned. With the passage of seven days without the boat's return, Magno alerted Customs and the County Sheriff's office. He ordered 24-hour surveillance on the residence to begin on May 31, 1974, because it had been this agent's experience that a trip to and from Jamaica would take at least ten days. On June 1st, he observed, parked in front of the residence, a mobile home of the type commonly used to transport marijuana when it has been imported into this country. Magno candidly admitted that in neither of the two memoranda which he prepared regarding the above events did he ever state that either marijuana or contraband was going to be on board the boat. He had no basis upon which to apply for a search warrant for the premises or arrest warrants for any individuals.

At approximately five o'clock in the afternoon of July 7, 1974, a vessel fitting the description of the one which had been docked at the residence was spotted by Customs agents at the entrance to the Intracoastal Waterway heading in the direction of this residence. The progress of this vessel was followed by boat and by car.

The vessel did, in fact, finally dock at the Dale residence and surveillance continued until about 6:30 that evening when the Cadillac, which had been previously parked at the residence, passed by a group of agents gathered in conference at an intersection a short distance away from the house to plan their next step. Agent Magno determined that they had been "spotted" and, being concerned that any further delay would result in a vacant residence, gave the order to "move in" on the house. The Customs agents arrived at the house in one car, the Sheriff's deputies in two more cars, and behind them was Magno and the DEA agents.

Magno recalled that as he pulled up, someone had opened the front door to the house. He called out, "Hold it, Federal agent." This person then "slammed the door." Magno went around one side of the house and three other agents went around the other side. The Sheriff's deputies and Customs officers were on their way and would guard the front.

The Customs agent asked Mr. Dale if he was the captain of the vessel. Dale merely gestured to another individual who was in the house. Thereupon, the agent entered the house through "already open" sliding doors. He approached Mr. Hailstone, flashed his identification and asked if he was the vessel's captain and if he had "come

foreign." Hailstone responded affirmatively to both questions. The agent then advised Hailstone that since he had not cleared customs, he was constructively seizing his vessel. A search of the boat revealed 5,814 pounds of marijuana.

Appellants virtually concede that once the Customs agent learned from Hailstone, the captain of the vessel, that he had "come foreign" without clearing customs, the agent acted within his statutory authority in boarding the vessel. 19 U.S.C.A. § 1581(a). Once this information was obtained, the search was reasonable and based upon a reasonable belief that an entry from outside the borders of the United States had been made. United States v. McDaniel, 463 F.2d 129 (5th Cir. 1972), cert. denied, 413 U.S. 919, 93 S.Ct. 3046, 37 L.Ed.2d 1041 (1973); Walker v. United States, 404 F.2d 900 (5th Cir. 1968). Appellants contend, however, that the knowledge that the vessel had "come foreign" was gained by an illegal search of the house. They argue that this knowledge was "the fruit of the poisonous tree" and could not be used to support the validity of the search of the vessel. Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

We resolve the issue against appellants on the ground that they have demonstrated no violation of their constitutional rights, a prerequisite to evidence suppression. In reaching this conclusion, we assume without deciding these things: First: the intrusion by the various agents on Dale's premises was made without probable cause sufficient to withstand a claim of illegal search under the Fourth Amendment. Ker v. California, 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed.2d 726 (1963); Theobald v. United States, 371 F.2d 769 (9th Cir. 1967). Second, the appellants had standing to object to any tangible evidence that a search of the premises might have produced. Parenthetically, we note that at the suppression hearing the Government stipulated that it would not use as evidence certain tangible items which were taken from inside the house after discovery of the marijuana aboard the vessel. Cf. Jones v. United States, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960); United States v. Banks, 465 F.2d 1235, 1240 (5th Cir.), cert. denied, 409 U.S. 1062, 93 S.Ct. 568, 34 L.Ed.2d 514 (1972). Third, the product of an illegal search of the premises could not have been used to validate the search of the vessel. Wong Sun v. United States, supra. Fourth, asking the questions of Dale and Hailstone was an invasion of their respective rights. Fifth, without the information obtained from Hailstone, the Customs agent would not have a valid reason for boarding the vessel.

We hold, however, even with these assumptions, that the information obtained from Hailstone was not the product of a search of the premises. The question asked of Hailstone, although assumed to violate Hailstone's rights, did not violate the appellants' constitutional rights.

[1] It is well-settled that "a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence." Alderman v. United States, 394 U.S. 165, 171-172, 89 S.Ct. 961, 965, 22 L.Ed.2d 176 (1969). A search of the premises might have violated the appellants' rights but an individual search of the persons on the premises would not.

[2] Of course, if appellants were charged with possession of the product of such individual search they could

successfully suppress it as evidence. Jones v. United States, supra. But such is not the case here. Once the marijuana was available for use as evidence by the Government, the information received from Hailstone was no necessary part of the case against the defendants. The Government could successfully prove the charge against the defendants without introducing in evidence the Customs agent-Hailstone confrontation.

In United States v. Breedlove, 444 F.2d 422 (5th Cir. 1971), the police stopped a car and arrested five occupants. The three male defendants claimed an illegal arrest and suppression of the evidence found in the car. Having previously pleaded guilty, the two female occupants testified for the prosecution. Although the court held the arrest legal, it alternatively held that the three defendants had no standing to challenge the testimonial evidence of the two females obtained as a result of the arrest, even if the arrest were illegal.

> We likewise reject appellants' arguments that the testimonial evidence of the two female accomplice witnesses was the fruit of an unlawful search incident to an illegal arrest. Even assuming, arguendo, the lack of probable cause for the arrest, appellants have no standing to challenge the invasion of another's rights. As the Supreme Court has noted:
>
> > "The established principle is that suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence. Coconspirators and codefendants have been accorded no special standing."

> Alderman v. United States, 394 U.S. 165, 171, 89 S.Ct. 961, 965, 22 L.Ed.2d 176 (1969). Fourth Amendment rights are personal rights which may not be vicariously asserted. Alderman, supra, at 174, 89 S.Ct. 961.

444 F.2d at 424.

In United States v. Miller, 145 U.S. App.D.C. 312, 449 F.2d 974 (1971), the defendant challenged the drawer search in a doctor's office, to which defendant had fled. Although the court held that the defendant had standing to challenge the police officer's entry into the suite itself, it denied him standing to object to a search of the drawer. The court said:

> Appellant, however, has no standing to challenge the search that produced Dr. Roberts' gun. "The established principle is that suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence." Alderman v. United States, 394 U.S. 165, 171-172, 89 S.Ct. 961, 965, 22 L.Ed.2d 176 (1969). Of course, as a person lawfully on the premises, appellant has standing to challenge the officers' entry into the suite itself. Jones v. United States, 362 U.S. 257, 267, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960). But appellant's own testimony establishes that he had no authority to open or use the drawer in which the gun was found, nor is there any suggestion that the gun itself belonged to him. Consequently, even if the search or seizure of the gun were

unlawful, appellant has not established that "he himself was the victim of an invasion of privacy." Jones v. United States, supra at 261, 80 S.Ct. at 731.

449 F.2d at 977.

An analogy may be drawn between this case and wiretap cases which hold that a defendant lacks standing to suppress on constitutional grounds a wiretapped conversation to which he was not a party obtained from a wire in which he had no possessory interest. See, e. g., Alderman v. United States, supra; United States v. Coley, 441 F.2d 1299 (5th Cir.), cert. denied, 404 U.S. 867, 92 S.Ct. 85, 30 L.Ed.2d 111 (1971). A defendant cannot suppress the fruits of a conversation between other persons overheard by the authorities. United States v. Armocida, 515 F.2d 29 (3d Cir. 1975).

[3] Finally defendant Allen contends that at trial he was denied effective assistance of counsel. Six months after undertaking the case, and within two months of trial, Allen's retained counsel moved to withdraw. The trial court denied the motion. Allen argues that his trial attorney was not prepared and did not have the ability to prepare for the trial because the attorney disassociated with his law firm prior to trial, was not employed by another firm, did not live in the situs state of the trial, and did not have legal facilities at his disposal. Although the trial court's denial may have inconvenienced counsel, on our review of the arguments presented and of the record in this case, it is not demonstrated that Allen's trial counsel rendered ineffective assistance.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

October 12, 1976

TO ALL COUNSEL OF RECORD

NO. 75-3486—USA v. Michael Ray Allen and
William Joseph McMurtrey

Dear Counsel:

This is to advise that an order has this day been entered denying the petition for rehearing,* and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition for rehearing en banc* has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

By /s/ Susan M. Gravois
Deputy Clerk

/smg
cc: Mr. Nelson Bailey
Mr. George D. Gold
Mr. Don R. Boswell
*on behalf of William Joseph McMurtrey

APPENDIX C

IN THE

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-3486

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

MICHAEL RAY ALLEN and WILLIAM JOSEPH McMURTREY,
Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Florida

ORDER:
[Filed October 20, 1976]

The motion of appellant, William Joseph McMurtrey, for stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including November 11, 1976, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court de-

nying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

/s/ Paul H. Roney
UNITED STATES
CIRCUIT JUDGE

No. 76-662

In the Supreme Court of the United States

OCTOBER TERM, 1976

WILLIAM JOSEPH MCMURTREY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DANIEL M. FRIEDMAN,
Acting Solicitor General,

BENJAMIN R. CIVILETTI,
Assistant Attorney General,

JEROME M. FEIT,
ELLIOTT SCHULDER,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-662

WILLIAM JOSEPH McMURTREY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 537 F. 2d 1387.

JURISDICTION

The judgment of the court of appeals was entered on September 7, 1976. A petition for rehearing with a suggestion of rehearing *en banc* was denied on October 12, 1976 (Pet. App. B). On November 11, 1976, the petition for a writ of certiorari was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner had standing to suppress the marijuana introduced against him at trial.

STATEMENT

Following a non-jury trial in the United States District Court for the Southern District of Florida, petitioner and three others were convicted of knowing importation of marijuana, in violation of 21 U.S.C. 952(a) and 960(a)(1), and of possession with intent to distribute marijuana, in violation of 21 U.S.C. 841(a)(1). Petitioner was sentenced to concurrent terms of four years' imprisonment and to two years' special parole. The court of appeals affirmed (Pet. App. A).

Prior to trial, petitioner moved to suppress as evidence nearly 6,000 pounds of marijuana discovered on a boat docked behind a co-defendant's house. The relevant facts, as developed at the suppression hearing, are as follows:

On May 13, 1974, Special Agent Raymond G. Magno of the Drug Enforcement Administration ("DEA") was informed by a private citizen that Charles Dale had purchased an expensive house in Lake Park, Florida, and that he had been primarily interested in the house's docking facility, which was capable of accommodating a large boat (Tr. 150, 197). On May 23, Agent Magno was told that a 43 foot boat had docked at the residence for one day and had departed (Tr. 151), and that several young men who had been at the house had left at the time of the vessel's departure (Tr. 152). When Magno drove past the house two days later, it appeared to have been abandoned, although a green Cadillac with Missouri license plates was parked in the driveway (Tr. 151-152).

After the boat had been gone for seven days, Magno began surveillance of the residence and requested assistance from the Customs Service and the County Sheriff's Office (Tr. 152, 199). On June 1, 1974, Magno saw a mobile home parked at the residence, which increased his

suspicion, since he knew from past experience that such vehicles are often used to transport smuggled contraband (Tr. 154, 198).

At approximately five o'clock in the afternoon of June 7, 1974,[1] a vessel fitting the description of the one that had earlier been seen at the residence was spotted by Customs agents at one of the mouths of the Intracoastal Waterway (Tr. 10, 41). The vessel was followed for about one hour, until it docked at Dale's residence (Tr. 11-13).

Shortly before seven o'clock that evening, a group of agents gathered at an intersection near the house to plan their future course of action. The Cadillac that had previously been sighted at the residence passed; its occupants observed the agents and the car then appeared to accelerate in the direction of the house (Tr. 154-156). Fearing that they had been spotted and that the premises would soon be vacated, Magno and the agents went directly to the house (Tr. 157-158, 201-202).

Upon Magno's arrival, an unidentified individual opened the front door of the house. Magno called, "Hold it. Federal agent," whereupon the person slammed the door shut (Tr. 202-203). Magno went around one side of the house and three other agents went around the other. The Sheriff's deputies and other federal officers remained in front (Tr. 14, 82-83, 203).

At the rear patio Customs Agent Gilbert Payette approached co-defendant Dale, who was standing on the porch, and asked for the captain of the vessel. Dale pointed to Hailstone, who was visible inside the house (Tr. 17, 78-80, 84). Agent Payette went in through the sliding doors

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[1]The date given in the opinion of the court of appeals — July 7, 1974 (Pet. App. 5) — was apparently an oversight.

that were already open and, after identifying himself to Hailstone, inquired whether the latter was the vessel's captain and whether he had just come from a foreign port (Tr. 17-18, 91-92). Hailstone responded affirmatively to both questions and acknowledged that he had not cleared customs. Payette then said that the vessel was under constructive seizure. Payette and Hailstone then went to the boat for a document inspection (Tr. 18-20, 142).

Magno also went inside the house through the open door. He announced that the boat was about to be examined by Customs and requested that everyone remain on the premises (Tr. 162). Payette found nearly 6,000 pounds of marijuana on the boat and arrested Hailstone (Tr. 20-21). Dale and four other individuals in the house were also arrested (Tr. 163-164, 171-172).

Subsequent to the discovery of the marijuana, the house was cursorily searched (Tr. 170-171). Shortly thereafter Hailstone shot and killed himself with a rifle (Tr. 188), and a more thorough search was made. At approximately ten o'clock, before leaving the house for the night, the agents searched a third time; petitioner was found hiding in a utility room attached to the garage (Tr. 121-124, 319).

ARGUMENT

Petitioner claims that the agents' initial entry into the house was illegal; that Hailstone's statements that the vessel had just come from a foreign port but had not cleared customs was the product of that illegality; that the subsequent search of the vessel and discovery of the marijuana were in turn the result of Hailstone's statements; and that he, petitioner, has standing to complain of the entire chain of events as violative of his Fourth

Amendment rights. Petitioner further claims that the court of appeals, in holding that the information obtained from Hailstone was not the product of an illegal search or of any violation of petitioner's rights, has rendered a decision that conflicts with *United States* v. *Guana-Sanchez*, 484 F. 2d 590 (C.A. 7), writ of certiorari dismissed as improvidently granted, 420 U.S. 513, and *United States* v. *Mallides*, 473 F. 2d 859 (C.A. 9).

To begin with, there is no conflict. In *Mallides* the court held that the initial stop of the defendant's car had been unlawful, tainting the discovery that his passengers were aliens who had entered the country illegally (and their testimony at trial). *Guana-Sanchez* involved the suppression for use at trial of "live witness testimony" that was arguably the fruit of an unlawful arrest;[2] it did not address the question whether and under what circumstances one individual is entitled to suppression of inculpatory evidence discovered as a result of a voluntary remark made by another individual to police officers who have illegally entered a building.

Since Hailstone was visible to Agent Payette before he entered the building, and the ensuing conversation between them involved no search of the premises, we believe the court of appeals' holding was correct. There is, however, no occasion for this Court to reach that issue in the present case, for petitioner failed to make a showing sufficient to have given him standing to complain of any conduct of the government officers—even the seizure of

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[2]The question whether the exclusionary rule requires the suppression of the trial testimony of a witness whose identity or whose possession of relevant information was learned as the result of an illegal search is presented in our petition in *United States* v. *Ceccolini*, No. 76-1151, now pending before the Court.

tangible evidence. Petitioner did not testify or otherwise present evidence on his behalf at the hearing on his motion to suppress. The evidence relating to him came from the testimony of several government agents that he was discovered, some three hours after the agents first entered the house, hiding in a utility room accessible via a door from the garage (Tr. 107, 268, 297, 319).

So far as the evidence shows, then, petitioner might have been in the utility room continuously from the moment the agents first approached the house and indeed might never have been in any other part of the house. Petitioner did not show that he had ever been to the house before; did not explain his relationship with the other people in the house; and did not even establish that he was in the house with the consent of the owner, Dale. Cf. *Jones* v. *United States*, 362 U.S. 257.

In these circumstances we submit that petitioner has not demonstrated that any reasonable expectation of privacy on his part was violated when Customs Agent Payette walked into the living room and asked Hailstone whether he was the captain of the vessel that had just been docked. See *Wong Sun* v. *United States*, 371 U.S. 471, 491-492. Since petitioner failed *in limine* to establish standing to object to the agent's entry into the house, it is unnecessary for this Court to consider whether the court of appeals was correct in ruling that petitioner lacked standing to object because of the nature of the evidence obtained (*i.e.*, voluntary statements) following the unlawful entry into the house.[3]

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[3]We recognize that, under the automatic standing rule of *Jones* v. *United States*, *supra*, petitioner would have standing in regard to the charge that he possessed the marijuana, in violation of 21 U.S.C. 841(a). In our view the automatic standing rule is without purpose after *Simmons* v. *United States*, 390 U.S. 377, and should accordingly be abandoned. Its continuing vitality was questioned but not decided by this Court in *Brown* v. *United States*, 411 U.S. 223, 228. The issue is an important one on which there exists a conflict among the circuits. Compare, *e.g.*, *United States* v. *Hunter*, C.A. 6, No. 76-1631, decided March 4, 1977, with *United States* v. *Boston*, 510 F. 2d 35 (C.A. 9), certiorari denied, 421 U.S. 990. There is no occasion to reach that issue in this case, however, since petitioner's four-year sentence on the possession count was made to run concurrently with his four-year sentence on the importation count (as to which the automatic standing rule by its own terms does not apply).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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